

Comprehensive Analysis of Charitable Companies in India

Introduction:

A non-profit organisation can be registered in India as a society, under the Societies Registration Act, 1860 or as a public charitable trust under the Indian Trust Act, 1882, or as a Section 8 (earlier Section 25 under Companies Act, 1956) company incorporated under Companies Act, 2013 (the “Act”). A Section 8 Company has various advantages when compared to a trust or a society like higher recognition and better legal standing for a governed structure and filing obligations. Section 8 Company also has higher credibility amongst donors, Government departments and other stakeholders. Unlike other forms of entities, a Section 8 Company needs to file financial statements and other documents, if applicable, with the concerned Registrar of Companies, as per the Companies (Filing of Documents and Forms) Rules.

A company under Section 8 of the Act can only be incorporated if its main object is promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any similar activity. The Act specifically provides that a Section 8 Company can utilise its profits only for promoting the objects of the company and no dividend be paid to its members.

Requisite Conditions under Charter Documents:

Requirements for incorporation of a Section 8 Company include minimum two shareholders/ guarantors; two individual directors (one being resident in India); and no minimum capital is required. A Section 8 Company cannot issue bonus shares, redeemable preference shares and no remuneration to its members in any forms whatsoever. The directors also cannot receive any form of remuneration except reimbursement of allowed expenses. Minimum one board meetings is required to be held every six months on English calendar basis. While the Act does not bar a Section 8 Company to spread its activities beyond geographical territory of India, such actions may hinder such Section 8 Companies to obtain exemptions under Income Tax Act.

How it is Named:

The scope of Section 8 permitted companies with charitable objects to be registered without mandatory inclusion of the words ‘Limited’ or ‘Private Limited’ as suffix to their names. As per rule 8 (7) of the Companies Incorporation Rules, for the companies incorporated under Section 8 of the Act, the name shall include the words Foundation, Forum, Association, Federation, Chambers, Confederation, Council, Electoral Trust and the like. Applicant needs to mention the significance of the abbreviated or coined word(s) used in the pro-

posed name. If the proposed name is or has used any word in any vernacular language e.g. Hindi, Marathi, Tamil, etc., then the applicant needs to mention the language and translation thereof. In case a proposed name is based on a registered trademark or is subject matter of an application pending for registration under the Trade Marks Act, 1999, applicant is required to furnish a no objection certificate for using such trademark in the proposed name from the proprietor of such registered name.

License for Section 8 Company through e-form INC-12:

The Ministry of Corporate Affairs (MCA) vide Companies (Incorporation) 6th Amendment Rules, 2019 (2019 Amendment Rules) has amended Section 8 Company incorporation procedure and power of respective Registrars of Companies (ROC) has been given to the Central Reservation Centre to approve license. Vide this amendment, licensing requirement through filing of e-form INC-12 for new Section 8 companies has been done away with. In case of conversion of an existing company to a Section 8 Company, filing of e-form INC-12 for license is still in place. Application for license can now be filed at the time of incorporation of a Section 8 Company by filing e-form SPICe (e-form INC 32) i.e. no prior approval through e-form INC-12 is required. License Number for a Section 8 Company shall be allotted at the time of incorporation. The process of incorporation of a Section 8 Company is now as simple as the process of incorporation of other companies.

Effect of 2019 Amendment on Incorporation of Section 8 Company:

Post 2019 Amendment Rules, the Act continues with the provision for companies incorporated for charitable purposes and provides for a framework for the same under Section 8 of the Act. Section 8 continues to provide for restriction on application of profits and permits the same only for the purpose



for which the company is promoted, prohibits declaration of dividend, continues to permit partnership firms to be a member of section 8 companies, etc. Memorandum of Association (MOA) of the Section 8 Company shall be in Form INC-13 and Articles of Association (AOA) are to be furnished in Table-H. The Indian Stamp Act, 1899, governs stamp duty on MOA & AOA of a Company or on any increase in share capital; on issue of share certificates; on transfer of shares, as adapted by respective state or stamp act of respective state. All States have difference approach towards levying stamp duty in in case of a Section 8 Company.



Restrictions on Remuneration / Payments to Members:

In case any employee is also a member, no remuneration or other benefit in money or money' worth can be given to him/her except reimbursement of out-of-pocket expenses, reasonable interest on loan taken, or reasonable and proper rent on premises let to the Company. Company may in good faith pay prudent remuneration to any of its members in return for any services (not being services of a kind which are required to be rendered by a member), actually rendered to the Company. Company can take loan from its members and pay interest thereupon, subject to the provisions of Chapter V of the Act read with rules made thereunder.

Default and Winding-up:

If a Section 8 Company defaults in complying with any of the requirements laid down in the Act, such Company shall be punishable with fine which shall not be less than ten lakh rupees but which may extend to one crore rupees and the directors and every officer of such Company, who is in default, shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than twenty-five thousand rupees but which may extend to twenty-five lakh rupees, or with both. Provided that when it is proved that the affairs of the Company were conducted fraudulently, every officer-in-default shall be lia-

ble for actions under the Act.

Upon the winding-up or dissolution of a Section 8 Company, if there remains any asset after the satisfaction of its debts and liabilities, the same may be transferred to another Section 8 Company having similar objects, subject to such conditions as imposed by the National Company Law Tribunal (NCLT), or may be sold, proceeds of which shall be credited to Insolvency and Bankruptcy Fund formed under Section 224 of the Insolvency and Bankruptcy Code, 2016. However, in no case, any part of such amount be rendered towards the benefits of its members in any form, direct or otherwise.

Conclusion:

Unlike a normal company, Section 8 Company solely works for the betterment of the society and all of its income and profits, if any are used to promote its objectives. Due to their easy management and effective objectives, these companies are more reliable for investors/ donors who want to work for the betterment of the society. Unlike the other companies like private, public, or one person, the companies registered under section 8 of the Act do not require share capital. They can be directly funded from subscriptions or donations made to them. Section 8 Company is a non-profit organization and are therefore eligible for seeking exemptions from the Income Tax Act, 1961 and registration under Foreign Contribution Regulation Act, 2010.

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